Populism and Judicial Backlash in the United States and Europe

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Common criticisms of judicial activism stretch from the somewhat outdated but nonetheless repeatedly re-emerging argument of courts' "counter-majoritarian difficulty"[1)]Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16 (1962). to the prevalence of disagreement in plural societies concerning the substance and scope of human rights.[2)] Richard Bellamy, "Rights as Democracy", *Critical Review of Social and Political Philosophy*, 15: 4, (2012). Beyond conceptual attacks, however, it is increasingly common to find politicians across the Atlantic who attack courts for decisions with which they simply disagree. Especially the recent resurgence of right wing populism in the United States and Europe makes the old puzzle of judicial legitimacy come to the fore. What should be the position of judges trying to safeguard democratic institutions, while exercising due restraint in the face of majority rule? Beginning to answer this question would require us to parcel out the notion of judicial backlash across two very different functions of the judiciary.

Precedent Setting in Rights-based Adjudication & Issue-Specific Backlash

Somewhat of a modern reiteration of the counter-majoritarian thesis, judicial backlash, primarily theorized in the U.S. constitutional law literature, is the perception that in departing from precedent for the sake of (progressive) rights interpretation, courts sometimes go "too far, too fast".[3)]Geoffrey R. Stone, *Justice Ginsburg, Roe v. Wade and Same-Sex Marriage*, The Huffington Post Blog, http://www.huffingtonpost.com/geoffrey-r-stone/justice-ginsburg-roe-v-wa_b_3264307.html. Doing so, judges are said to deflect important social movement energy from more productive and legitimate channels of effectuating change in a legal *status quo*. In America, the backlash narrative is primarily associated with a reassessment of the Warren Court's legacy.[4)]Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 416 (2d ed. 2008). Regarding racial desegregation, the ferocity of the conservative reactions that followed the landmark decision in *Brown v. Board of Education* led prominent commentators – including traditional supporters of a strong federal judiciary and civil rights like Cass Sunstein–to start calling for judicial caution and minimalism. Regarding abortion, Justice Ginsburg has similarly been concerned that "by issuing so bold and far-reaching a decision" in *Roe v. Wade* the US Supreme Court triggered a bitter and divisive response that "polarized the nation to this day."[5)]*Id.* In the context of recent gay marriage decisions, the words of Ginsburg, despite of her joining the majority opinion in *Obergefell*, sounded like an alarm bell for all those who feared that conservatives would once again be energized in the states to resist an item on the progressive agenda – this time marriage equality – and obstruct it with all possible means.

First, it is highly disputed whether majoritarian concerns such as reliance on public opinion or state-level legislative consensus should have played a role in deciding these cases the way they were decided at the time they were decided and whether such concerns should be explicitly incorporated in the doctrine like they are in U.S. Eight Amendment cases (tying the interpretation of "cruel and unusual punishment" to "evolving standards of decency").[6)]"…evolving standards of decency that mark the progress of a maturing society…" In re *Stanford*, 537 U.S. 968, 971, 123 S.Ct 472, 475 (2002), (Stevens, J., dissenting). In Europe, the European Court of Human Rights (ECtHR) routinely refers to "emerging consensus" or "societal trends" to either bolster its precedents or defer to a Convention Member State court or legislature. Second, in rights-based adjudication, majoritarian concerns can also play a justificatory rather than substantial role. As Reva Siegel has argued: "…one can acknowledge the importance of public opinion without treating majority support as (1) indispensable or (2) sufficient to sustain a constitutional ruling…"[7)]Reva B. Siegel, *Same-Sex Marriage and Backlash: Consensus, Conflict, and Constitutional Culture*, (2017). Be that as it may, backlash against the judiciary in this context turns out on issue-specific outcomes of individual court decisions. Popular and democratic constitutionalists[8)]Compare Barry Friedman, The Will of The People: How Public Opinion has Influenced the Supreme Court and Shaped

The Meaning Of The Constitution (2009) with Robert C. Post & Reva B. Siegel, “Roe Rage: Democratic Constitutionalism and Backlash”, 42 *Harvard Civil Rights-Civil Liberties Law Review* 373, (2007). may diverge on the meaning and consequences of such issue-specific judicial backlash, suggesting different ways of confronting it. Conversely, the role of and attacks on the judiciary in the context of the separation of powers differs in a non-trivial way. At stake here is systemic failure.

Courts and the Separation of Powers: Systemic Failure

Courts’ role in upholding basic liberal principles and constitutional guarantees against an unrestrained executive aims at preserving systemic integrity and should be uncontested in a democracy. If judges are deprived of the power of judicial review, they become part of senseless institutions turned into but the extended arm of an authoritarian government. Judges’ responsibility in preventing democracies from backsliding into authoritarian regimes is elevated in this context, even at the risk of being exposed to backlash from incumbent politicians. Judicial deference to the political branches in times of crisis is similarly unwarranted as it puts institutional legitimacy and systemic integrity in question.

In an emergency proceeding in February 2017, the US Ninth Circuit Court upheld a district court’s temporary stay of a presidential executive order. The executive order enacted by the Trump administration aimed at banning for ninety days the entry into the United States of individuals from seven, primarily Muslim countries. Two states, Washington and Minnesota, challenged the order as unconstitutional. Trump reacted with a virulent offensive on courts, and his government argued that courts not only owe substantial deference to the political branches on immigration and national security matters but that the order couldn’t be reviewed in court at all. The Ninth Circuit upheld jurisdiction on the basis that the states have shown that the executive order “causes a concrete and particularized injury to their public universities”.[9)]United States Court of Appeal for the Ninth Circuit, No. 17-35105, D.C. No. 2:17-cv-00141, p. 9. The States alleged that the “teaching and research missions of their universities are harmed by the Executive Order’s effect on their faculty and students who are nationals of the seven affected countries”.[10)]Id., at p. 10. Although an examination on the merits is still pending, the Ninth Circuit’s message was clear:

> *Aspects of the public interest favor both sides…On the one hand, the public has a powerful interest in national security and in the ability of an elected president to enact policies. And on the other, the public also has an interest in free flow of travel, in avoiding separation of families, and in freedom from discrimination.[11)]Id., at p. 28.*

In the aftermath of the financial crisis, across Europe populists mainly from the far right of the political spectrum are trying to claim the vote of some of the victims of the rising inequality and worsened economic conditions across the continent. A case in point is the government of Victor Orban in Hungary. A recent law put forward by Orban endangers the existence of the Central European University and following some of the arguments put forward by the Ninth Circuit, can be challenged on freedom of expression and breach of media plurality grounds before the European courts. Even if Orban’s illiberal regime has preemptively managed to *de facto* pack the Hungarian judiciary, the ECtHR can still act as a safety valve against threats to democracy. Deference on the part of that court, if seized, would be disastrous as it would essentially rubberstamp systemic institutional failure in Hungary.

In the face of Brexit, the European Union is once again having a hard time. As pointed out by Menendez and others,[12)]Agustín J. Menéndez, “The Crisis of Law and the European Crises: From the Social and Democratic Rechtsstaat to the Consolidating State of (Pseudo-)technocratic Governance” in 44 *Journal of Law & Society: Special Issue: Austerity and Law in Europe*. following the financial crisis, ‘austerity’ was entrenched in EU law under the guise of technocratic governance, while creditor or surplus states (a minority within the Eurozone) were significantly empowered at the expense of representative EU institutions, such as the EU Parliament. Discussing the debate in the UK that preceded Brexit, Simon Deakin notes that: “Job losses and plant closures over many years, resulting in the casualisation of wages and working conditions, have led to disenchantment

with the European project among sections of the UK population that might have been expected to support it, given the role of EU law in providing for a range of social rights that UK governments would almost certainly not."[13]Simon Deakin, "Brexit, Labour Rights and Migration: Why Wisbech Matters to Brussels", in *Brexit Supplement* 17 *German Law Journal* 13 (2016). If EU law is indeed moving away from the ideal of a Social and Democratic Rechtstaat, and neither the EU institutions nor the Member State ones are able to challenge that turn, the general disenchantment with the EU project but also with national liberal democracies may lead to a dangerous systemic failure on the continent that goes beyond Brexit. In the meantime, the CJEU has stepped back from reviewing state austerity measures under the EU Charter of Fundamental Rights. Although Romanian and Portuguese courts "questioned the CJEU about the compatibility between domestic legislation cutting public sector pay and several Charter rights, the judges laconically declared that their Court lacked jurisdiction since the domestic courts had failed to specify the connection with EU law.[14]Case C-134/12 Corpul National al Politistilor [2012], Order of the Court, para 13; Case C-128/12 Sindicato dos Bancários do Norte and Others v BPN [2013], Order of the Court, para 12. Aida Torrez Pérez argues that these decisions stand "in stark contrast to the easiness with which the CJEU tends to reformulate preliminary references to uphold jurisdiction".[15]Aida Torrez Pérez, "The Federalizing Force of the EU Charter of Fundamental Rights: A Cautionary Tale", forthcoming in *International Journal of Constitutional Law*, 2017. The CJEU might have chosen to show deference to the political process at EU level in order to avoid putting its authority at stake and showing restraint in the face of majority rule. This leaves space for the Member State courts to work out different interpretations to the EU austerity measures under their constitutions and convince the CJEU to tackle these questions as soon as there is a new referral.

To sum up, when courts innovate in rights adjudication, tethering to existing social mores and majoritarian trends can perhaps enhance the persuasive force of precedents and soften the blow of issue-specific backlash. To what extent this hold true remains primarily a sociological and empirical inquiry. Judges' role in upholding institutional stability is entirely different: exercise of judicial power in that context becomes countermajoritarian as a matter of normativity and is justified by the need to preserve well-established democratic values threatened by populism.

Parts of this post are adapted from *Federalism, Rights and Backlash*, International Journal of Constitutional Law (forthcoming, 2017), co-authored with Thomas Kleinlein.

References [+]

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2. ↑ Richard Bellamy, "Rights as Democracy", *Critical Review of Social and Political Philosophy*, 15: 4, (2012).
3. ↑ Geoffrey R. Stone, *Justice Ginsburg, Roe v. Wade and Same-Sex Marriage*, The Huffington Post Blog, http://www.huffingtonpost.com/geoffrey-r-stone/justice-ginsburg-roe-v-wa_b_3264307.html.
4. ↑ Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 416 (2d ed. 2008).
5. ↑ *Id.*
6. ↑ "…evolving standards of decency that mark the progress of a maturing society…" In re *Stanford*, 537 U.S. 968, 971, 123 S.Ct 472, 475 (2002), (Stevens, J., dissenting).
7. ↑ Reva B. Siegel, *Same-Sex Marriage and Backlash: Consensus, Conflict, and Constitutional Culture*, (2017).
8. ↑ Compare Barry Friedman, The Will of The People: How Public Opinion has Influenced the Supreme Court and Shaped The Meaning Of The Constitution (2009) with Robert C. Post & Reva B. Siegel, "Roe Rage: Democratic Constitutionalism and Backlash", 42 *Harvard Civil Rights-Civil Liberties Law Review* 373, (2007).
9. ↑ United States Court of Appeal for the Ninth Circuit, No. 17-35105, D.C. No. 2:17-cv-00141, p. 9.

10. ↑ Id., at p. 10.

11. ↑ Id., at p. 28.

12. ↑ Agustín J. Menéndez, “The Crisis of Law and the European Crises: From the Social and Democratic Rechtsstaat to the Consolidating State of (Pseudo-)technocratic Governance” in 44 *Journal of Law & Society: Special Issue: Austerity and Law in Europe*.

13. ↑ Simon Deakin, “Brexit, Labour Rights and Migration: Why Wisbech Matters to Brussels”, in *Brexit Supplement* 17 *German Law Journal* 13 (2016).

14. ↑ Case C-134/12 Corpul National al Politistilor [2012], Order of the Court, para 13; Case C-128/12 Sindicato dos Bancários do Norte and Others v BPN [2013], Order of the Court, para 12.

15. ↑ Aida Torrez Pérez, “The Federalizing Force of the EU Charter of Fundamental Rights: A Cautionary Tale”, forthcoming in *International Journal of Constitutional Law*, 2017.

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